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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1223

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

REPUBLIC COTTON MILLS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered on January 31, 1945, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 1–25)[1] are not reported.

[1] References (R. —) are to the Appendix to the claimant's principal brief in the Circuit Court of Appeals. References (B. —) are to the separate Appendix B to the Commissioner's brief in the Circuit Court of Appeals. References to the proceedings in the Circuit Court of Appeals are designated

The opinion of the Circuit Court of Appeals (C. C. A. 1–10) is reported in 147 F. 2d 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1945 (C. C. A. 10–11). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on review of a decision of the Tax Court denying a claim for refund of processing taxes, the Circuit Court of Appeals erred in directing the Tax Court to treat one of claimant's three mills as a separate entity having a separate claim for purposes of determining the statutory margins, and of determining whether claimant bore the burden of the tax, when all the mills processed the same taxable commodity—cotton.

2. Even if the margins for Mill No. 3 should be computed separately, whether the court below erred in failing to hold that the Commissioner's evidence was sufficient to overcome the presumption that the taxpayer had borne the burden of the tax, and in directing the Tax Court, in effect, to allow a refund on the basis of the favorable margin alone.

(C. C. A. —). No references are made in this petition to Appendix B to the claimant's reply brief which is certified as part of the record in this case.

3. Even if the margins for Mills Nos. 1 and 2 should be separately computed, whether the Circuit Court of Appeals erred in setting aside the decision of the Tax Court and in directing it to reconsider evidence introduced by the claimant to rebut the presumption indicating that claimant did not bear the burden of the tax as to cotton processed in these mills.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the statute and regulation involved are set out in the Appendix, *infra,* pp. 27–33.

STATEMENT

This proceeding is based upon a claim for refund of amounts aggregating $435,340.73, paid as processing tax under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of cotton (R. 2). The taxing provisions of that Act were held unconstitutional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, and Congress thereafter enacted the Revenue Act of 1936, Title VII of which authorizes the refund, subject to certain specific conditions and limitations, of amounts collected as tax under the Agricultural Adjustment Act.

This claimant is a South Carolina corporation, organized in 1909, with its principal place of business at Great Falls, in that State. During the effective period of the Agricultural Adjustment

Act, and for many years after and prior thereto, it was engaged in the manufacture of cloth from cotton, rayon, and silk. (R. 2–3.) As such it was liable for taxes on the cotton processed, but not on the rayon and silk, under the Agricultural Adjustment Act (R. 7). During the period from August 1, 1933, through March 31, 1935, the claimant reported and paid a total of $435,340.73 as processing tax, plus $53.61 interest (R. 3). On June 29, 1937, the claimant filed a claim, pursuant to the applicable provisions of the Revenue Act of 1936, for refund of $435,343.54 paid as processing tax. The claim was disallowed in full by the Commissioner by registered letter dated July 3, 1940, and on August 6, 1940, the claimant petitioned the Processing Tax Board of Review for a review of the Commissioner's action. (R. 3.)

This case was tried on the merits before a member of the Processing Tax Board of Review. Briefs had been filed, the presiding member of the Board had filed his recommended findings of fact and decision, exceptions to some of the recommended findings had been filed, and oral argument had before the full Board when the Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its functions transferred to the Tax Court. At this stage of the proceeding the case was transferred to the Tax Court. The Tax Court made its findings of fact substantially as recommended by the

presiding member of the Board of Review, and entered its decision that the claimant is not entitled to recover any part of the processing tax paid. (R. 2, 35.)

The evidence introduced by the parties is voluminous, and the findings of fact made by the Tax Court are extensive and detailed (R. 2–23). They are substantially as follows:[2]

The claimant operated three mills at Great Falls, South Carolina, an unincorporated community of approximately 4,000 inhabitants and located some distance from any other town (R. 3). Mill No. 1 was constructed in 1911; Mill No. 2 in 1917; and Mill No. 3 in 1924. Mill No. 1 is about a quarter of a mile distant from Mill No. 2, and Mill No. 3 is three-quarters of a mile distant from each of the other mills. (R. 4.)

At all times material hereto the yarn used in claimant's Mills Nos. 1 and 2 was spun therein. Those mills were operated together as a single manufacturing unit with the same superintendent and operating organization. They consumed only carded cotton yarn and their production was limited to a few standard constructions of coarse cotton gray goods and certain special orders for closely related cloths, all in the print division of the cotton textile industry. Mill No. 3 was oper-

[2] Counsel for the claimant insisted before the Tax Court that findings be made whether or not material to the theory adopted by the Tax Court (R. 68).

ated separately from Mills Nos. 1 and 2. It had its own superintendent and operating organization; it maintained separate accounts, with the exception of accounts receivable and payable, mill village, power lines, etc.; and on occasions it maintained different hours of employment. It manufactured fine goods and specialties out of fine combed yarn separately from the manufacture of coarse goods in Mills Nos. 1 and 2. It manufactured at various times an all-cotton cloth, a cloth of mixed cotton and rayon, a cloth of mixed cotton and silk, an all-rayon cloth, and, to an insignificant extent, a cloth containing a mixture of silk and rayon. With the exception of one standard combed cotton cloth and one combed lawn, practically all the production of Mill No. 3 was specially styled. All the rayon and silk yarns were purchased, as was a small amount of cotton yarn, but most of the cotton yarn used by Mill No. 3 was spun in its own plant. (R. 4–5.)

In the sale of its goods the claimant pursued methods which were common to the cotton industry generally. Its cotton cloth was sold almost exclusively as gray goods through commission houses to large industrial houses or converters and finishers who in turn dealt with the cutting-up trade, the large department and chain stores, and other large consumers. During the tax period, claimant sold the products of Mills Nos. 1 and 2 through Cannon Mills, Incorporated, and

the products of Mill No. 3 through J. P. Stevens & Company, both of New York City. (R. 5.)

"The business conducted by the petitioner [claimant] was carried on and maintained as a single business venture" (R. 7).

During the period before and after the tax (August 1, 1931–July 31, 1933, and February–July, 1936, inclusive), sometimes referred to herein as the "base period", the claimant processed 14,354,862 units of the commodity (pounds of cotton) having a cost of $1,398,487.21 and a gross sales value of $4,418,641.43. The statutory "average margin" for the base period was $0.2103924 per unit (pound) of cotton processed. During the tax period (August 1, 1933–March 31, 1935) the claimant processed 10,364,230 units (pounds) of cotton having a cost of $1,341,182.86 and a gross sales value of $4,221,198.63 on which it paid processing taxes of $435,394.34. The statutory "margin" per unit of commodity (pound of cotton) processed during the tax period was $0.2358710 per pound. The "average margin" per unit for the tax period thus exceeded the "average margin" for the base period by $0.0254786 per pound, thus raising the statutory presumption that the claimant bore none of the burden of the tax. (R. 8.) If the margins are computed separately, the margin for the tax period is less than that of the base period for Mill

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No. 3 and greater than that of the base period for Mills Nos. 1 and 2 (R. 8).[3]

The tax levied under the Agricultural Adjustment Act upon the processing of cotton became effective August 1, 1933. For three or four months prior to the effective date of the tax, during which period the cotton trade anticipated the possibility of the ultimate levying of such a tax, it was customary for contracts of sale to carry what was known as a tax-to-be-added clause under which the purchaser agreed to pay, in addition to the contract price, any amount which "the seller is required to pay to the Federal Government on account of taxes or charges not now existing." (R. 8–9.) All of the claimant's contracts for the sale of its articles containing cotton, which were executed within several months prior to August 1, 1933, carried such a clause or a clause of similar import (R. 9). With respect to deliveries made on or after August 1, 1933, under contracts which had been made prior to that date, and which carried the tax-to-be-added clause, the claimant added to its invoices and collected as separate items, designated as processing tax, amounts aggregating $27,224.55. Of that amount, $11,221.15 was ap-

[3] The number of pounds processed during the tax period and the base period, the cost and gross sales value, the amount of processing tax paid, and the average margin per unit for the base period and the tax period, are set out separately for Mills Nos. 1 and 2 and for Mill No. 3 in the findings of the Tax Court (R. 8).

plicable to sales contracts which were completed by delivery of goods, the cotton content of which had been subjected to the floor stocks tax levied under the Agricultural Adjustment Act. The balance of $16,003.40 was applicable to sales contracts completed by delivery of goods, the cotton content of which had been subjected to the processing tax. Of this amount, $9,280.97 is attributable to the production of Mills Nos. 1 and 2, and $6,722.43 to Mill No. 3 production. (R. 8.)

The price on any contract carrying the above tax-to-be-added clause necessarily remained indeterminate until delivery had been completed because the rate of tax was not immediately known, because deliveries might be completed before imposition of the tax, and because some uncertainty existed as to the appropriate conversion factor which would represent tax on a pound of raw cotton converted to tax on a yard of completed goods. These conversion factors necessarily varied between mills and resulted in a certain amount of confusion. After these uncertainties had, to a certain extent, been removed by the imposition of the tax and the determination of the rate, selling agents representing the various mills undertook to revise the tax-to-be-added clause then generally in effect. The Association of Cotton Textile Merchants of New York joined in making a recommendation for a clause to the effect that the tax and labor clause then generally in use should

be discontinued as of August 1, 1933, "inasmuch as quotations will be based on existing conditions with respect to all manufacturing costs", and that "on any business, on and after August 1, prices be quoted and sales made to include the cotton processing tax of .0420 a pound as part of the cost of raw material". (R. 9, 10.) Clauses of an import similar to the above were generally and immediately adopted by the claimant, with respect to all its mills, and by the entire industry (R. 10).

On August 1, 1933, for the express purpose of shifting the burden of the processing tax, offering quotations on each of the standard constructions made by Mills Nos. 1 and 2 were very generally increased by adding to the basic quotations at which its goods had been sold in July, amounts varying from ¾¢ to 1¼¢, according to the amount of tax estimated to have been incurred with respect to a finished yard of each particular construction. The volume of sales at these prices was relatively small, although the claimant and its selling agents endeavored to effect sales at the new level of prices and thus to pass on the burden of the processing tax. (R. 10.)[4]

During the tax period and the four months immediately following (August 1, 1933, to July 31,

[4] A table setting forth in cents per yard the trend in prices during July and August, 1933, on sales made by the claimant, was set out in the recommended findings of the presiding member of the Board and incorporated in the Tax Court's findings by reference (R. 10, 33).

1935), there was no instance of a sale of any construction by Mills Nos. 1 and 2 at a price as high as the August 1, 1933, quotations. During that period, however, certain sales were made by the claimant at prices in excess of the prices received by it on sales made July 13–15, 1933, or the July 31, 1933, quotation (whichever was lower). The total amount which the claimant actually received on sales during this two-year period (August 1, 1933–July 31, 1935) exceeded by $38,852.06 the total amount which it would have received at the July 1933 scale of prices. (R.11–12.)

The claimant's labor and other manufacturing expenses were increased during the tax period as compared with the base period (R. 15). The cost of doing business (exclusive of commodity costs) per unit of the commodity processed for the tax period with respect to all three mills was $0.185037. The cost of doing business per unit of the commodity processed in respect of all three mills was greater by $0.0171654 for the tax period than for the base period. The average margin per unit of the commodity processed for all three mills, after adjustment for such increase in expenses, was $0.0083132 greater in the tax period than it was in the base period. (R. 20.)

With respect to Mills Nos. 1 and 2, the claimant's average total cost per pound of lint cotton processed, plus the cost of labor, direct expenses, and selling expenses, was $0.1239406 for the tax

period and $0.0930084 for the base period—an excess of $0.0309322 per pound for the tax period over the base period (R. 15–16). With respect to the cotton-content fabric produced by Mill No. 3, the claimant's average cost per pound of lint cotton processed, plus the cost of labor, direct expenses, purchased yarn (cotton, rayon, and silk), dyeing expense, and selling expense, was $0.42831929 for the tax period and $0.45885446 for the base period—a decrease of $0.03053517 for the tax period as compared with the base period (R. 20–21).

Claimant's Mills Nos. 1 and 2 originally were constructed and equipped for the manufacture of print cloths and carded broadcloths similar to those produced during the tax period, and at all times prior to that period these mills were exclusively engaged in the production of these and related constructions. Complete records of production and profits are not available for 1918 and prior years. For the entire period of fourteen calendar years immediately preceding the tax period (1919–1932, inclusive), the average manufacturing profit for Mills Nos. 1 and 2 was equivalent to $0.05558306 per lint pound of cotton processed. In four of the twenty months of the tax period, the monthly margins for Mills Nos. 1 and 2 were adequate to yield the claimant a manufacturing profit of $0.05558306 per lint pound of cotton processed. No processing was done in one month of the tax period, and in the

other fifteen months of the tax period, the monthly margins were inadequate, at least to the extent of $172,923.88, to yield the claimant a profit equal to $0.05558306 per lint pound of cotton processed. (R. 12–13.)

Mill No. 3 was operated at a loss for 1930–1935, inclusive (which includes the tax period), with the exception of 1933. During 1934 and 1935, its operations were so costly that the board of directors considered the advisability of an expenditure of $500,000 or more to change the character of its entire production. Notwithstanding the effort to offset losses resulting from the manufacture of cotton content fabrics by entering the all-rayon fabric field (to which certain looms were adapted in 1933—the year of the profit), the claimant was unable to show a net profit for the twenty-month tax period. Deducting from the statutory margins all monthly costs and expenses relating to the production and sale of all goods produced in Mill No. 3, the operations of Mill No. 3 showed a loss of $89,708.99 for the tax period in the production of cotton content fabrics and a profit of $67,749.12 in the production of non-cotton fabrics, or a loss of $21,959.87 for the tax period on all production of Mill No. 3. (R. 18–19.)

During the statutory base period before and after the tax, the claimant operated at a net loss, as to all of its mills combined, totaling $93,183.

During the tax period it realized a net operating profit of $274,637.89. (R. 23.)

The Tax Court held (R. 23–25) that the claimant's business conducted through Mills Nos. 1, 2 and 3 was a single entity, that the statutory margins for the tax period and the base period, computed as a whole, were in favor of the Government, and, on a consideration of all the evidence, that the claimant had failed to prove that it bore the burden of any processing taxes paid. It sustained the action of the Commissioner in denying any refund of tax.

The Circuit Court of Appeals reversed the decision of the Tax Court and directed it to consider Mill No. 3 as a separate business from Mills Nos. 1 and 2 for all purposes, including the computation of the statutory marginal presumption, and as if a separate claim had been filed by Mill No. 3. It directed the Tax Court to reconsider and reweigh the facts as to Mill No. 3 indicating that in its opinion there was a basis for refund of tax. It also directed the Tax Court to separately reconsider all the evidence with respect to Mills Nos. 1 and 2, despite a favorable marginal computation in favor of the Government, and directed it to redetermine whether the claimant bore the burden of a part of the tax which was paid. (C. C. A. 1–10.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the average marginal computations provided by Section 907 (a) of the Revenue Act of 1936, upon which is based the statutory presumption as to whether the claimant bore the burden of the tax paid, should be computed separately for Mill No. 3 and Mills Nos. 1 and 2 where one basic commodity—cotton—was processed by all three mills.

2. In directing the Tax Court to consider the claim of Mill No. 3 separately from Mills Nos. 1 and 2 where one joint claim for refund of processing taxes paid was filed by claimant for all three mills which processed one basic commodity—cotton.

3. In holding that the Tax Court was required, as a matter of law, to consider Mill No. 3 and its operations separately and apart from Mills Nos. 1 and 2 and to reweigh the evidence accordingly.

4. In directing the Tax Court to reconsider and reweigh the evidence in the case of Mills Nos. 1 and 2 to determine whether any part of the processing tax paid had been borne by claimant, despite the statutory margins favorable to the Government and affirmative proof by the Commissioner that the sales contracts contained clauses pursuant to which the tax was passed on to purchasers.

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5. In setting aside the finding of the Tax Court that the claimant "did not bear the burden of any part of the amount it paid as tax with respect to its processing of cotton" despite the evidentiary support in the record for that finding.

6. In weighing the evidence and in making findings of fact based thereon contrary to the findings of the Tax Court.

7. In substituting its view of the facts for that of the Tax Court.

8. In usurping the functions of the Tax Court and in substance directing it, on reconsideration of the evidence, to allow a refund of taxes paid.

9. In reversing the decision and judgment of the Tax Court and in remanding the case for further proceedings.

REASONS FOR GRANTING THE WRIT

After the taxing provisions of the Agricultural Adjustment Act were declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, Congress enacted Title VII of the Revenue Act of 1936, governing the refund of amounts so collected. Section 902 (Appendix, *infra,* pp. 27–28) conditions the refund of any amount upon the taxpayer's establishing that he bore the burden of the tax and did not shift it, directly or indirectly, to others. The power of Congress to impose such conditions upon the right to recover taxes ille-

gally collected was sustained in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, rehearing denied, 302 U. S. 772. Cf. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

Section 907 of the 1936 Act (Appendix, *infra*, pp. 28–33) prescribes a formula for determining the extent to which a taxpayer shall be presumed to have borne or shifted the tax burden. Subsection (a) of Section 907 provides that it shall be *prima facie* evidence that the burden of the tax was borne by the claimant to the extent that the "average margin per unit of the commodity processed" was lower during the tax period than the "average margin" during the period before and after the tax; and if the "average margin" during the tax period was not lower "it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others".

Section 907 (e) provides that either the taxpayer or the Commissioner may rebut the presumption established by Section 907 (a) "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax." Those provisions were considered by this Court in *Webre Steib Co.* v. *Commissioner*, No. 148, decided February 12, 1945.

1. The decision below runs counter both to the plain words of the statute and to its underlying purpose which is to prevent unjust enrichment

of a claimant through the recovery of processing taxes. The statute plainly provides for the computation of one average margin for the base period and one average margin for the tax period with respect to each commodity on which a processing tax was paid by the claimant. Subsection (b) of Section 907 defines the "average margin" and prescribes a method for computing the average margin on a monthly basis for the tax period and for the period before and after the tax. Monthly margins for the tax period are computed by deducting from the "gross sales value" of all articles processed during the month the cost of the commodity processed plus the processing tax, and dividing the result by the total number of units of commodity processed during such month. Monthly margins for the period before and after the tax are computed in a similar manner except that there is no processing tax included. The statutory "average margin" for each period is computed in the same manner as the monthly margins, "using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during each period." The "commodity processed" by this claimant, and upon which the tax in question was paid, was cotton.[5]

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[5] Section 11 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended (7 U. S. C. 611); Section 913 (c) of the Revenue Act of 1936 (7 U. S. C. 655).

Clearly there is nothing in the statutory language to suggest that separate margins may be computed for mills owned by the same taxpayer which process commodities subject to the same tax. Indeed, the decision below creates an anomalous situation: under Section 907 (e) (2), (Appendix, *infra,* pp. 32–33), a means is provided whereby a shift in the tax burden through dealings in a *non-taxed* product will prevent recovery; but in a case like that at bar in which only one commodity, and that *subject to the tax,* is involved, the necessary result of the ruling below is that the burden of the tax on Mill No. 3 processing, for instance, could be shifted through Mills Nos. 1 and 2 sales, and that the taxpayer would nevertheless obtain a refund.

The parties stipulated, and the Tax Court found, that the claimant's statutory "average margin" for the tax period was greater than its statutory "average margin" for the base period by $0.0254786 per pound (R. 8). Thus, by virtue of the provisions of Section 907 of the 1936 Act, the claimant is presumed to have shifted to others the entire amount of the processing tax paid by it, and the burden was upon it to prove the "actual extent" to which it bore the tax. This burden of proof remained upon the claimant throughout the trial. *Webre Steib Co.* v. *Commissioner, supra,* slip opinion, pp. 5–6.

2. The decision of the Circuit Court of Appeals, that Mill No. 3 and its operations must be considered separate and apart from Mills Nos. 1 and 2 in computing the statutory marginal presumption under Section 907 (a), is in conflict, in principle, with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co.* v. *Commissioner,* 139 F. 2d 47 (C. C. A. 6th), and *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780. In the *Tennessee Coal* case, *supra,* p. 50, it was held that under comparable provisions of the unjust enrichment tax statute—"Aggregate, and not individual sales, are the criteria for computing the margin for the base period and for the tax period, as well as for the computation of the tax" regardless of the type or grade of the commodity. And in the *Colonial Milling* case, *supra,* the court held that under Section 907 (a) consideration must be given to all transactions of the entire period as a whole. That is exactly what the Tax Court did in the instant case; it combined the figures for all three mills to determine the statutory over-all marginal presumption against the claimant and in favor of the Government for the single commodity—cotton—processed by the mills.

The Circuit Court of Appeals relied upon *I. L. Walker Tobacco Co.* v. *Commissioner,* 129 F. 2d 464, decided by the Circuit Court of Appeals for

the Sixth Circuit[6] prior to its decision in the *Tennessee Coal* and *Colonial Milling* cases, *supra*. We do not believe that that case was correctly decided, especially in the light of the fact that the Processing Tax Board had not computed separate margins.[7] But, in any event, that case involved a commodity taking the form of two different grades of tobacco—burley tobacco for smoking and scrap tobacco for chewing. Each of these grades bore a different rate of tax,[8] while all cotton processed in the instant case was subjected to the same rate of tax.

The tax here was levied on the processing of cotton regardless of grade or type, and selected and segregated sales cannot properly be used to show that the tax burden was borne by Mill No. 3 since Section 907 (b) (3) (Appendix, *infra*, p. 29) expressly prohibits any separation or segregation of sales. This Section provides that the average

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[6] No petition for a writ of certiorari was filed in that case, chiefly for the reason that separate computations still showed margins favorable to the Government.

[7] In the *Walker* case as in this case, the circuit courts of appeals' decisions run counter to Article 602 of Treasury Regulations 96 promulgated under Section 903 of the Revenue Act of 1936 (7 U. S. C. 645) (Appendix, *infra*, p. 33), which provides that only one claim for the refund of processing taxes paid on each commodity may be filed. Here only one claim was filed and the court below erred, we submit, in directing the Tax Court to consider the claim of Mill No. 3 separately from the claim of Mills Nos. 1 and 2 (C. C. A. 8).

[8] T. D. 4395, XII–2 Cum. Bull. 466 (1933); T. D. 4494, XIII–2 Cum. Bull. 500 (1934).

margin for each period shall be ascertained by using total gross sales value, total cost of the commodity processed, total processing tax paid, and total units of the commodity processed. The statute clearly contemplates one marginal computation, one presumption, and a decision based on the aggregate of all transactions relating to the one commodity processed.

3. If, however, the statute could conceivably be construed as permitting the computation of separate margins for separate mills in an appropriate case, it was for the Tax Court to decide whether the circumstances here justify that procedure, and the court below erred in reversing the Tax Court's determination. *Dobson* v. *Commissioner,* 320 U. S. 489, 501–502, rehearing denied, 321 U. S. 231. The Tax Court found (R. 7) that the claimant's milling business "was carried on and maintained as a single business venture" and the Circuit Court of Appeals expressed no disagreement. That finding should have been deemed dispositive.

4. In addition to the marginal presumption determined by the Tax Court in favor of the Government under Section 907 (a), the Tax Court found (R. 25), on a consideration "of all the evidence" which was voluminous, that the claimant had not shown that it bore the burden of the processing taxes or proved that the taxes were not passed on to its customers.

During the tax period the claimant realized a net operating profit of $274,637.89 while it operated at a net loss of $93,183 during the base period (R. 23; Ex. AY). The fact that the claimant's average margin for the tax period, even after adjustment to reflect differences in labor and other expenses, exceeded its average margin for the period before and after the tax (R. 20) is persuasive evidence that the burden of the tax was shifted.

Moreover, the Commissioner introduced evidence to show that the claimant had actually passed the tax on to others (R. 8–11; B. 1–20, 28–32, 36, 39, 41, 47, 53–55). This consisted of claimant's concession that it intended and tried to pass the tax on (B. 15–16); correspondence between the claimant and its selling agents with reference to including the tax in the cost of goods sold (B. 15–19, 62; Exs. J, AL, AO); various contracts and sales notes carrying clauses showing that the price of goods sold included the tax (B. 30–31, 53–55); the use of the "up and down" clause in sales contracts (B. 1–6), which provided that if the tax rate was revised upward the purchaser would pay the processor the difference between the existing rate and the increased rate, but that if the rate was revised downward the processor would pay the purchaser the difference; and the use of the "Charlotte Clause" on claimant's contracts (B. 9), providing that if the Agri-

cultural Adjustment Act was declared unconstitutional the processor would reimburse the purchaser for the amount of processing tax on the cotton content of the finished garment (B. 8–10); Exs. AR, AZ, L, C, M). After the Act was declared unconstitutional, the claimant actually made refunds to its purchasers for the amount imposed but not paid as processing tax in the selling price of the article (B. 9–14, 32, 36; Exs. D, E, F, G, H, AK).

The "up and down" clause was admittedly used in all of the claimant's contracts until about the time the Agricultural Adjustment Act was declared unconstitutional. That clause and its effect is discussed in *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, 215, and *United States* v. *Standard Rice Co.*, 323 U. S. 106, 109–110. The employment of such clauses in contracts of sale is a clear indication that the tax was passed on to others and was not borne by the claimant, and is tangible proof of the fact that the claimant was collecting the processing tax from others by means of a flat selling price which included the tax. The Circuit Court of Appeals did not comment on any of the above evidence but ignored it completely despite the findings of the Tax Court (R. 8–10). These factors must have been considered by the Tax Court in making its ultimate finding of fact (R. 23) that the claimant did not bear the burden of the processing taxes paid.

There is ample evidence in the record to support that finding and it is clear from the Tax Court's opinion that it considered "all the evidence" and did not rest on the marginal presumption alone (R. 25). This evidence not only reinforces the presumption as to Mills Nos. 1 and 2, but serves to overcome any favorable presumption as to Mill No. 3. *Webre Steib Co.* v. *Commissioner, supra.*

5. The Circuit Court of Appeals has usurped the functions of the Tax Court in weighing the evidence and in substituting its judgment of the facts for that of the Tax Court. This results in a conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Snyder* v. *Commissioner,* decided April 2, 1945 (1945 C. C. H., par. 9245), an unjust enrichment tax case, and is contrary to repeated admonitions of this Court in *Dobson* v. *Commissioner,* 320 U. S. 489; *Equitable Society* v. *Commissioner,* 321 U. S. 560, 563; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Commissioner* v. *Court Holding Co.,* No. 581, decided March 12, 1945; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 294; and *Helvering* v. *Kehoe,* 309 U. S. 277, 279. To weigh the evidence and to choose between conflicting inferences is the function of the Tax Court. *Wilmington Co.* v. *Helvering,* 316 U. S. 164, 168; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40; *Hulburd* v. *Commissioner,* 296 U. S.

300, 306. This Court should exercise its supervisory powers to direct the Circuit Court of Appeals to apply this principle to this case. *Commissioner* v. *Wemyss,* No. 629, March 5, 1945.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

APRIL 1945.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed

therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct

the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part

of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of

article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant proc-

essed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. 649.)

Article 602 of Treasury Regulations 96, promulgated under Section 903 of the Revenue Act of 1936, provides:

Limitation as to number of claims.—A separate claim shall be filed with respect to each commodity on the processing of which the claimant paid processing tax. In the case of tobacco, all market classifications of tobacco shall be considered a single commodity and, therefore, there shall be included in one claim all of the market classifications of tobacco on the processing of which the claimant paid processing tax. Only one claim shall be filed by any person with respect to the total amount paid by such person as processing tax on the processing of a single commodity (or of all market classifications of tobacco).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

v.

REPUBLIC COTTON MILLS.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION.

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The outstanding reason why this petition should be denied is that it falls short of presenting any substantial reason why it should be granted. In the first place it does not even purport to suggest that this case involves any considerations of general or public importance, or that the decision below would have any appreciable effect as a precedent. It has been nearly ten years since the processing tax was declared unconstitutional by this Court, and it

is notorious that the Government has long since succeeded only too well in forcing settlement of most of the resulting claims, large or small. The whole subject has become pretty much of a dead issue. Relatively speaking, only a handful of cases remain unclosed, and apparently few if any of them involve the same points as the present case.

Indeed, in spite of its length, the petition only makes two claims which, even on their face, could be conceived of as rising to the dignity of accepted reasons for the granting of certiorari by this Court. One is a half-hearted assertion at page 20 that the decision below that, in computing the statutory marginal presumption, the operations of Mill 3 should be considered separately and apart from those of Mills 1 in 2 "is in conflict, in principle" with the decisions of the Circuit Court of Appeals for the Sixth Circuit in the *Tennessee Consolidated Coal* and *Colonial Milling* cases. The other is a similar assertion at pages 25-26 of conflict with the decision of that same court in the recent *Snyder* case and with the admonitions of this Court in the *Dobson* case, combined with a claim that this Court should therefore exercise its supervisory powers. We will later comment on these points in the order named.

1. *As to Petitioner's Statement of the Questions Presented.*

Respondent does not agree with petitioner's statement of the questions presented by the record herein.

In the first question propounded by petitioner, the last clause reading "when all the mills processed the same taxable commodity—cotton" should be deleted and language similar to the following substituted:

> "when one of the mills in a separate plant with separate operating organization, processed a wholly distinct and more costly market classification, type and grade of cotton, not combined with the other grades processed by the other mills, thereby producing at a much higher cost distinctly different and specially styled cloths that

were sold through a separate sales mechanism, at much higher prices, to a different trade for different uses than the standard products of the other two mills".

The second and third questions propounded by respondent do not appear to require consideration at this time, for the decision below remanded the case to the Tax Court to consider the separate margins and weigh the evidence respecting the bearing of the burden of the tax, and to enter judgment according to the many decided cases, some of which were cited.

2. *As to Petitioner's Statement of the Facts.*

Certain facts bearing on the legal requirement for separate treatment of the two groups of mills are omitted in the petition, but are summarized in the opinion below, hereinafter quoted.

The limitations upon this brief do not permit pointing out all the inadequacies and inaccuracies in the petition and warning against the misconceptions to which they could so readily give rise. Before going further, however, there is one which should not be allowed to remain uncorrected. We refer to the recital about the margins in the long paragraph on page 7 of the petition, and especially to the introductory "If the margins are computed separately, * * *" in the sentence at the bottom of the page. Let no one think that this respondent's margins could be computed in any other way. The raw material, finished product, and operations of Mills 1 and 2, on the one hand, and of Mill 3, on the other hand, are so different in every respect that not even the Government has ever suggested that margins could be computed otherwise than by *first* computing all the factors separately for Mills 1 and 2 and for Mill 3. The respective figures for the various factors set forth in the paragraph on page 7 are nothing more than the combination of the corresponding separate figures for each mill (R. 7-8, 25-29, C. C. A. 5). By the same token the resulting presumptions

had to be separately rebutted, and from the very nature of things there was a difference in the kind of evidence relevant to the utterly different kind of operations and products of the several mills.

Petitioner also omits all reference to the findings of the Tax Court, respecting the so-called "tax-included clauses" in taxpayer-respondent's sales contracts, as follows (R. 10-11):

> "24. On and after August 1, 1933, phrases such as 'tax included', 'prices include processing tax', 'including processing tax', and the like were widely used by trade journals in connection with published Market quotations. The use of such phrases in that connection grew out of the fact that published quotations and prices on and after that date were all stated at flat, all-inclusive figures which were not subject to further adjustment on account of the processing tax, and also because it was highly desirable that it be made clear that published quotations were on this new basis as distinguished from methods of quotation which had been used prior to August 1, 1933.
>
> 25. These phrases were not generally used in petitioner's sales contracts. During the 20 months' tax period, petitioner entered into 596 sales contracts for Mills 1-2 and 487 sales contracts for Mill 3, a total of 1,083 contracts. In but 27 of those contracts with respect to Mills 1-2, and 27 of such contracts with respect to Mill 3, did any such phrase appear."

3. *The holding below that the operations of the two groups of mills must be separately considered was a ruling on a question of a law in full accord with the only reported decision in point, the two cases claimed by petitioner to be "in conflict, in principle" being not in conflict but actually tending to support the opinion below.*

The opinion of the Tax Court covers only two printed pages, one of which is devoted to a synopsis (quite inadequate) of the taxpayer-respondent's contentions (R. 24-25). Without citing a single case, without reference to the con-

trolling statutory provisions, and without any attempt to analyze the facts, that Court summarily disposed of the issues on the basis of combining the margins for Mill 3 with those of Mills 1 and 2.

The appellate court below, without attempting to weigh the evidence, concluded that such combination of margins and attempted solution of the problem was "erroneous as a matter of law", not being authorized by the statute, and being in direct conflict with the principle previously laid down in *Walker Tobacco Co.* v. *Commissioner*, 129 F. (2d) 464 (C. C. A. 6, 1942), which it quoted at length. The court below succintly summarized *the facts found by the Tax Court* and ruled as follows (C. C. A. 4, 6-7):

> "We think that the findings of fact made by the court require the conclusion that this method of computation was *erroneous as a matter of law.*
>
> The business conducted at the three mills was carried on by claimant as a single business venture. Mills 1 and 2, however, were operated as a single manufacturing unit with one superintendent and operating organization. Their production during the tax period was confined to five standard constructions of coarse cotton grade goods made from carded yarns produced from short staple cotton in the print cloth division of the textile industry. Mill 3, located three-fourths of a mile from Mills 1 to 2, was operated separately with its own superintendent and operating organization; it maintained separate accounts, except accounts receivable and payable; it sold its products through a different sales agency; its products lay in a division of the industry separate and apart from the manufacture of coarse goods and consisted in the manufacture of a constantly changing line of fine goods and specialties which were made from combed yarns produced from higher priced long staple cotton. The goods were composed at various times of a cloth of all-cotton, a cloth of mixed cotton and rayon, a cloth of mixed cotton and silk, or a cloth of all-rayon. During the tax period Mill 3 made over 50 different constructions in 500 or more styles.

None of the short staple cotton used by Mills 1 and 2 was mingled with the long staple cotton used by Mill 3 or vice versa. The manufacturing processes were separate and distinct and the two types of cotton were not combined in the finished products.

The two kinds of cotton were bought and manufactured at different costs and sold on different markets. During the tax period Mills 1 and 2 processed 8,249,683 pounds of short staple cotton at an average cost of 12.5¢ per pound while Mill 3 processed 2,114,547 pounds of long staple cotton at an average cost of 14.2¢ per pound; the average manufacturing cost per pound in Mills 1 and 2 was 12.39¢ while in Mill 3 it was 42.83¢; and the average sales value of the finished product derived from a pound of cotton in Mills 1 and 2 was 34.3¢ while in Mill 3 it was 65.8¢.

* * * * * * * * *

It is true that Sec. 907 (b) (4) provides that where the articles produced are the product of several commodities combined by the claimant during processing, the average margin shall be established with respect to such commodities as a group; but no such condition prevailed in the claimant's business. There was no combination of commodities in the goods produced in Mills 1 and 2 with those produced in Mill 3. On the contrary, as the court found, the manufacturing operations and selling operations were completely separate; the commodities used and the goods produced were of different qualities and values; and the market conditions were diverse. *The court seems to have relied entirely on the statutory presumption based on an average margin calculated in a manner that finds no support in the statute or in the facts of the case.*

We are in accord in this respect with the holding in *I. L. Walker Tobacco Co.* v. *Commissioner*, 6 Cir., 129 F. 2d 464, where a decision of the Tax Court was reversed wherein two basically different commodities, burley tobacco and scrap tobacco, were treated as one in calculating the statutory margins on goods produced by a manufacturer of smoking and chewing tobacco." (Italics supplied.)

Even cursory examination of the controlling statutory provisions proves that the court below was justified in so holding. Sec. 907(b), quoted in the appendix to the petition, requires a separately computed average margin computation for each "commodity" in respect of which a processing tax was collected. Sec. 913(c) defines "commodity" as a commodity of a type with respect to which a processing tax was imposed by the Agricultural Adjustment Act. Sec. 11 of the Agricultural Adjustment Act of May 12, 1933, C. 25, 48 Stat. 31 (U. S. C. A., Title 7, Sec. 611) provides as follows:

> "As used in this chapter, the term 'basic agricultural commodity' means wheat, rye, flax, barley, *cotton*, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugar cane, and milk and its products, *and any regional or market classification, type, or grade thereof;* * * *." (Italics supplied.)

Sec. 907 (b) (4) provides:

> "(4) COMBINATION OF COMMODITIES.—Where, as for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury."

Thus it is clear that each "market classification, type, or grade" of cotton is to be treated as a separate commodity;* and further clear that such separate commodities may not be combined for purposes of the average margin computations except where "combined" during processing. This was the holding in the *Walker Tobacco Co.* case. Under Sec. 11 of the Agricultural Adjustment Act, *supra*, both tobacco and cotton are defined as commodities. The reference in

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*T. D. 5407 (Int. Rev. Bull. 1944—19—11862) similarly recognizes the different grades of cotton as distinct raw materials for income accounting purposes.

Sec. 907 (b) (4) to articles produced from several "types of tobacco" as an "example" is clearly equally applicable to articles produced from several "types of cotton". Unless the different types are combined in processing, Sec. 907 (b) (4) definitely contemplates that the average margin shall not be "established with respect to such commodities as a group". The Tax Court's conclusion (R. 25) that all three mills "must be treated as a single business entity" is wholly immaterial; obviously a "single business entity" might process a number of different commodities.

Indeed petitioner admits the decision below is in accord with the *Walker Tobacco* case, but urges (p. 21) that that case was not correctly decided. For purposes of this petition, however, the significant point is that two circuits (Fourth and Sixth), in well considered opinions, have reached like conclusions on the legal question involved. This in itself affords a sufficient ground for denial of the petition.

Petitioner's claim that the decision below "is in conflict, in principle", with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co.* v. *Commissioner*, 139 F. (2d) 47, and *Colonial Milling Co.* v. *Commissioner*, 132 F. (2d) 505, does not bear up under analysis.

At the outset it is to be noted that this Court denied certiorari in the *Colonial Milling* case (318 U. S. 780); and that both such cases were decided by the *same* circuit court that decided the *Walker Tobacco* case. In fact, the *Walker* case is cited in the *Colonial* opinion. So apparently the Sixth Circuit Court of Appeals was not itself aware of any inconsistency in its three decisions.

The *Tennessee Consolidated Coal* case related to unjust enrichment tax in respect of unconstitutional bituminous coal taxes not paid, and was governed by wholly different statutes from the present case. The unjust enrichment tax is an income tax based on all the taxpayer's operations for

a specified taxable year. Hence the decision cannot control a case like the present.

However, with respect to the *Tennessee Consolidated Coal* case, we need go no further than the quotation relied upon by the Government at page 20 of the petition, for it shows on its face that its requirement of the use of aggregate sales relates only to "computing the margin for tne base period and for the tax period", and there has never been the slightest question in the present case as to every sale of the 14,354,862 pounds of cotton processed in the base period and the 10,364,230 pounds processed in the tax period having been all included in the marginal computations (R. 7-8, 25-29). It is interesting to note, however, that in that case, just as here, a decision of the Tax Court in favor of the Government was reversed. Indeed, the appellate court went much further than here in categorically holding that the taxpayer's evidence "is convincing that the burden of the tax * * * was not shifted" and that the taxpayer's "proof was sufficient to rebut the presumption that the tax was shifted".

Nor does the holding in the *Colonial Milling* case that "consideration must be given to all transactions of the entire period as a whole" afford any conflict. That is exactly what was done in the instant case with respect to both the marginal computations and the rebuttal evidence. In that case the rebuttal evidence was of the same nature as that relied upon by the taxpayer in large part in the instant case, viz., a comparison of actually realized tax-period prices with the corresponding price level prevailing before the imposition of the tax. The ruling referred to at page 20 of the petition did not relate to the marginal computation. It related to the rebuttal evidence. The court, at 132 F. (2d) 509, definitely *conceded the relevancy of this type of evidence* but ruled against the taxpayer because the presumption "cannot be rebutted by presenting details favorable to the petitioner covering only part of the transactions for the periods." There is no conflict between that case and the instant case because here the rebuttal evidence covered *every sale* made by Mills 1 and 2 (R. 11-12).

4. *The decision below turned on questions of law; the circuit court did not attempt to usurp the functions of the Tax Court, but remanded the case for further proceedings in accordance with established legal principles; hence there has been no disregard of the rule of Dobson v. Commissioner, 320 U. S. 489.*

At pages 25-26 the petition calls for exercise by this Court of its supervisory powers because—it is alleged—the court below has usurped the functions of the Tax Court in weighing the evidence, choosing between conflicting inferences, and substituting its judgment of the facts for that of the Tax Court. Even a cursory examination of the record, however, readily shows that the court below has done nothing of the sort.

Snyder v. *Commissioner*, ... F. 2d ...., decided April 2, 1945 (another Sixth Circuit case) adds nothing to what was ruled by this Court in the *Dobson* case. This Court will well remember that in the latter case it ruled that the Tax Court's "decision, of course, must have 'warrant in the record' and a reasonable basis in the law" and that there must be "a rational basis for the conclusions approved by the administrative body" (320 U. S. 501). It needs only a brief analysis of the record to show that the instant decision of the Tax Court had neither; in fact, we have already shown that the Tax Court's holding that the operations of the three mills should be considered as a unit has no "warrant in the record" or "basis in the law". The court below therefore usurped no function of the administrative agency when it reversed and remanded the case with directions that all pertinent evidence should be weighed and considered and "that separate consideration should be given to this claim upon the remand in the light of the rule laid down in the statute and applied in numerous decisions" which it then proceeded to recite (C. C. A. 10). Incidentally, it will be noted the court below expressly refused to substitute its own judgment for that of the Tax Court, saying (C. C. A. 7-8):

"It was obviously not the purpose of the statute to confer upon the appellate courts the power to make an independent determination on the evidence as a whole and to substitute its judgment of the facts for that of the Board of Review or of the Tax Court which succeeded it. The power to make primary and ultimate findings of fact and to draw all proper inferences therefrom is lodged in the trial tribunal. Our function is limited to questions of law.

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It will therefore become the duty of the Tax Court upon the remand to consider the claims of refund for taxes on the goods produced in Mills 1 and 2 separately from claims for refund on goods produced in Mill 3."

The petition fails to state that this case was on trial for seventeen days; that the Government devoted many days to introducing the evidence and exhibits which it cites at pages 23-24 of the petition and which it claims to be relevant; but that despite its request for findings of fact summarizing that evidence, the presiding officer declined to recommend such findings. It fails to state that under the detailed procedure expressly provided by Sec. 906 (d) and (e) of the Revenue Act of 1936, 49 Stat. 1748, and Rule 25 of the Processing Tax Board of Review, a copy of his recommended findings of fact was sent to each party by registered mail; that the Government had thirty days in which to file exceptions and proposed corrections; that, as specifically noted by the Tax Court in its memorandum, the Government "filed no such exceptions" (R. 2); and that the Tax Court "adopted, with slight modification, the findings recommended by the presiding officer" (C. C. A. 3). It was thus the administrative agency, and not the appellate court below, which decided that the voluminous evidence of which the Government makes so much at pages 22-25 of its petition was not relevant; and having thus, nearly four years ago, deliberately elected not to except to the recommended findings, all considerations of orderly procedure require that the Government be not permitted to again drag such evidence back into the case.

But that is only the negative side of the matter. The Tax Court did make forty-three paragraphs of comprehensive affirmative findings of basic facts (R. 2-23). The controlling issued argued to and decided by the court below was whether those findings did or did not support its ultimate conclusion against the present respondent.

Incidentally, it will be noted that that conclusion went all the way in holding affirmatively that the taxpayer respondent "did not bear the burden of any part of the amount it paid as tax with respect to its processing of cotton" (R. 23). But this case is not an all-or-none one. The $435,394.34 of unconstitutionally collected tax would permit as many as 43,539,435 possible decisions. In other words, the Tax Court held affirmatively that this respondent had shifted the burden of every one of those 43,539,434 cents—a thing which was obviously impossible on the face of the Tax Court's own actual findings of fact.

In coming now to those findings of fact, as to which the petition also is strangely silent, it is to be kept in mind that in the long line of representative circuit court of appeals cases cited at the end of the opinion below (C. C. A. 10), it had been held, at the joint instance of both the Government and taxpayers, that comparison of sales prices before and after imposition of the tax (as originally suggested by the Solicitor General himself at pages 138-139 and 105 of his brief to this Court in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 377) has become the most generally approved and widely used method of determining the extent to which the burden of the processing tax was borne or was shifted by the processor.

The ultimate issue before the court below was one of whether the Tax Court's own considered and comprehensive findings of fact constituted "warrant in the record" and "a rational basis" (as those terms are used in the *Dobson* case) for its conclusion, and we feel sure that when this Court reads those findings of fact (R. 2-23) with this in mind, it will fully agree that the court below did not ex-

ceed its proper functions and that there is no occasion to review or disturb its decision. Aside from the legal effect of the findings relating to the combination of the three mills (already discussed), we ask specifically what "rational basis for the conclusions approved by the administrative body" can possibly be found in its own considered findings of fact to the very opposite effect, that this respondent's products were sold on the open market in New York City (R. 5); that conditions culminating in July 1933 brought such a sharp increase in production and such a serious condition of overproduction in the textile industry that by August 1933 (when the processing tax was first imposed) supply began to exceed demand (R. 6); that that condition persisted with little abatement throughout the entire 20 month tax period (R. 6); that the oversupply became so serious that, in order to prevent demoralization of the price structure, N. R. A. on three different occasions executed orders limiting all productive textile machinery to 75% of the hours otherwise permitted by the Code (R. 6, and see the vigorous recitals and provisions of those orders the text of which is quoted at R. 76-78); that in spite of those preventive measures the nationwide unsold stocks of respondent's principal products increased from 22,000,000 yards at the beginning of the tax period to 121,000,000 yards at its close (R. 17); that on August 1, 1933, the effective date of the tax, and for the express purpose of shifting the tax, offering quotations were increased by adding the amount of the tax to the theretofore prevailing price (R. 10); that the volume of sales at those prices were relatively small, and that in no instance was there even a single sale of any product of Mills 1-2 at a price as high as its August 1, 1933, quotation (R. 10, 31-33); that within a month quotations had declined to a point as low as or lower than the July price level before addition of the tax (R. 10, 31-33); that on the actual sales of Mills 1-2 alone the total of such increases in the July level of prices was only $38,852.06, which was $307,731.31 less than the total tax on the cotton cov-

ered by those sales (R. 11-12); and that throughout ev month of the tax period respondent's other costs for cot manufacturing, and selling were nevertheless greater t in July, 1933 (R. 14, 27); that Mill 3 was run at a loss d ing the tax period (R. 18-19); that the comparison of Mill 3 margins, separately computed, is favorable to t payer-respondent (R. 8); etc.?

It is clear that the Tax Court predicated its decision the erroneously computed margins and ignored the mand of Sec. 907 (e) that consideration be given to "proof of actual extent to which the claimant shifted to others burden of the processing tax", and hence the court bel was correct in reversing such decision and remanding case for further consideration in accordance with est lished legal principles.

5. *Conclusion.*

For the foregoing reasons, the petition for a writ of c tiorari should be denied.

Respectfully submitted,

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